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No. 97-1061

IN THE
UNITED STATES SUPREME COURT
OCTOBER TERM, 1997

RICKY EUGENE MORROW,
Petitioner,
v.
THE STATE OF TEXAS,
Respondent.

On Petition for Writ of Certiorari
To the Texas Court of Criminal Appeals

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Did counsel provide constitutionally effective assistance when he assisted his client in pleading guilty based on his knowledge and information at the time of the pleas?

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TO THE HONORABLE JUSTICES OF THE UNITED STATES SUPREME COURT:

NOW COMES the State of Texas, Respondent herein, by the Attorney General of Texas, and files this Brief in Opposition.

OPINION BELOW

The opinion of the Texas Court of Criminal Appeals is published as *Ex parte Morrow*, 952 S.W.2d 530 (Tex. Crim. App. 1997).

JURISDICTION

Morrow attempts to invoke the jurisdiction of this Court under the provisions of 28 U.S.C. § 1257.

CONSTITUTIONAL PROVISIONS INVOLVED

Morrow bases his claim on Fifth, Sixth, and Fourteenth Amendments to the United States Constitution.

STATEMENT OF THE CASE

Morrow is in lawful custody pursuant to judgments and sentences of the 204th Judicial District Court of Dallas County, Texas. Morrow was charged by indictment in Cause No. F82-83550-Q with the capital murder of Mark Frazier, committed during a robery. He pleaded not guilty and was tried by a jury, which found him guilty and sentenced him to death.

He also was charged in two indictments (Nos. F82-82402-Q and F82-82403-Q) with attempted capital murder of peace officers who were attempting to arrest him at the hotel room where he was hiding, and in another indictment (No. F82-83706-Q) with aggravated robbery which he committed before he robbed and killed Frazier. On November 23, 1983, after he was found guilty of capital murder and sentenced to death, Morrow pleaded guilty to all three charges. He was found guilty of each offense and sentenced to fifty years imprisonment for each. He did not appeal his convictions or sentences.

In 1988, the Court of Criminal Appeals reversed Morrow's capital murder conviction. *Morrow v. State,* 753 S.W.2d 372 (Tex. Crim. App. 1988). When he was retried for capital murder in 1990, he testified that he had not intended to kill Frazier but that his gun had discharged accidentally. He

also stated that he had fired shots into the ceiling at the hotel in an effort to provoke the police into killing him, but that he did not shoot at or intend to kill the officers. The state introduced his judicial confessions to the attempted capital murders, in which he admitted that he had intended to kill the officers. The jury again found him guilty and again sentenced him to death. The Court of Criminal Appeals affirmed his conviction and sentence on appeal, *Morrow v. State*, 910 S.W.2d 471 (Tex. Crim. App. 1995), and this Court denied certiorari. *Morrow v. Texas*, 517 U.S. 1192 (1996).

On January 18, 1994, Morrow filed an application for state writ of habeas corpus challenging the voluntariness of his guilty pleas to attempted capital murder and aggravated robbery. He contended that he had not been told that the convictions could have adverse consequences for him if his capital murder conviction was reversed and he was retried, and that if he had known that, he would not have entered guilty pleas. The trial court conducted a lengthy hearing, entered findings of fact and conclusions of law, and recommended that relief be denied. The Court of Criminal Appeals denied relief. *Ex parte Morrow*, 952 S.W.2d 530 (Tex. Crim. App. 1997). Morrow seeks certiorari review of that decision.

REASONS FOR DENYING THE WRIT

I.

THE QUESTION PRESENTED FOR REVIEW IS UNWORTHY OF THIS COURT'S ATTENTION.

Rule 10 of the Rules of the Supreme Court provides that review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only where the court

finds there are compelling reasons because of the importance of the issues presented. Morrow presents no important reasons or issues in this case, and none exist. Further, the issues in this case involve the application of settled law to the particular facts of this case. Thus, the petition presents no important question to justify this Court's exercise of its certiorari jurisdiction.

II.

THIS CASE IS NOT IN THE CORRECT PROCEDURAL POSTURE FOR REVIEW AT THIS TIME.

Morrow seeks certiorari review of the judgment of the Texas Court of Criminal Appeals denying state habeas corpus relief. Normally, the Court considers that review of federal constitutional claims is more appropriate when the case comes before it in federal habeas proceedings. *See Kyles v. Whitley,* 498 U.S. 931, 932 (Stevens, J., concurring in denial of certiorari), *citing Huffman v. Florida,* 435 U.S. 1014, 1017-1018 (1978) (STEVENS, J., respecting denial of petition for certiorari). Morrow still can present his claims in a petition for writ of habeas corpus, have the claims adjudicated by the lower federal courts, and then seek review by this Court. He has offered no reason why the Court should depart from its normal practice.

III.

MORROW HAS FAILED TO SHOW THAT COUNSEL RENDERED INEFFECTIVE ASSISTANCE BY ADVISING HIM TO PLEAD GUILTY TO THE THREE CHARGES AGAINST HIM.

Morrow asserts that his attorney's advice to plead guilty to the attempted capital murder and aggravated robbery charges, after he had been convicted of capital murder, was unreasonable and amounted to ineffective assistance. As a result, he contends that his guilty pleas were involuntary, so that his convictions must be vacated.

The longstanding test for determining the validity of a guilty plea is "whether the plea represents a voluntary and intelligent choice among the alternative courses of action open to the defendant." *North Carolina v. Alford,* 400 U.S. 25, 31 (1970). Where a defendant is represented by counsel during the plea process and enters his plea upon the advice of counsel, the voluntariness of the plea depends on whether counsel's advice "was within the range of competence demanded of attorneys in criminal cases." *McMann v. Richardson,* 397 U.S. 759, 771 (1970). A defendant who pleads guilty upon the advice of counsel "may only attack the voluntary and intelligent character of the guilty plea by showing that the advice he received from counsel was not within the standards set forth in *McMann.*" *Tollett v. Henderson,* 411 U.S. 258 (1973).

In *Strickland v. Washington,* 466 U.S. 688 (1984), this Court defined the two prongs of attorney effectiveness, the absence of which a criminal defendant must demonstrate in order to obtain relief. First, he must show that counsel's performance was deficient; second, he must prove that the

deficient performance prejudiced the defense. *Id.* at 687. A defendant who pled guilty must make the same showing. *Hill v. Lockhart,* 474 U.S. 52, 58 (1985). The first half of the *Strickland v. Washington* test is nothing more than a restatement of the previously noted standard of attorney competence. To satisfy the "prejudice" requirement, the defendant must show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial. *Hill v. Lockhart,* 474 U.S. at 59.

Because an after-the-fact review of counsel's performance runs the risk of judging effectiveness by the outcome of the representation, reviewing courts must make every effort "to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." *Strickland v. Washington,* 466 U.S. at 689. To insure that the proper judgment is made, the court "must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'" *Id.* (citation omitted).

A. To the extent that counsel advised Morrow to plead guilty to the three outstanding charges against him, the advice was reasonable based on his knowledge at the time.

Morrow contended that he had not intended to kill the victim of the capital murder, but that his gun had gone off accidentally. However, he had an extensive criminal history,

consisting of at least nine felony convictions, including four prior robberies. II *Ex parte Morrow* 472.[1] The decision was made the he would not testify at trial, in part to prevent his record from being revealed to the jury at the guilt-innocence phase.[2] *Id.* at 471. Morrow also told his attorneys that when he was surrounded by police officers in the hotel where he was hiding he decided to shoot at them to provoke them into killing him. He claimed that he fired both at them and at the ceiling in the bathroom where he was hiding. Testimony and physical evidence introduced at the first trial supported the fact that he had shot at the police. 85 SR 556-62.[3] There was no indication that shots had been fired into the ceiling of the bathroom.

After he was convicted and sentenced to death, Morrow decided that he wanted to plead guilty to the remaining charges. His attorney, Bill Bratton, who also represented him on the capital murder charge, advised him to go to trial on each of the other cases, I *Ex parte Morrow* 274. When Morrow insisted on pleading guilty, however, Bratton saw no adverse consequences to his doing so. Even if Morrow's conviction for capital murder was reversed, Bratton did not expect that Morrow would testify

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[1] References to the state writ proceedings is to *Ex parte Morrow*, No. 72,593, preceded by the volume number and followed by the page number.

[2] To negate Morrow's intent to kill Frazier, the defense introduced evidence of the other aggravate robbery that he committed that same day. Counsel hoped to show that Morrow might be a robber but that he did not kill his victims, so that the jury had a basis for finding that Frazier's killing was an accident.

[3] "SR" refers to the record from Morrow's first trial, preceded by the volume number and followed by the page number.

at a retrial, so the new convictions would not matter. I *Ex parte Morrow* 288.

Prior to his retrial, Morrow told his new attorney that he had not fired at the police from his hotel room but that he had shot at the ceiling in the room's closet. Counsel discovered that there was some physical evidence that corroborated the fact that Morrow had shot into the closet ceiling (although there still was the testimony from the police that Morrow fired at them as well). In order to buttress his account that he had not intended to kill Frazier, Morrow testified in his own defense. He also testified that he had not intended to kill the police prior to his arrest. The state introduced his convictions and judicial confessions in the attempted capital murder cases, in which he acknowledged his intent to kill the police. Morrow contends that Bratton was ineffective for not telling him that the guilty pleas could be used later to impeach his testimony, to rebut his testimony that he did not intend to kill the officers, to inferentially rebut his testimony that he did not intend to kill Frazier, as part of his prior criminal record to show that he would be a danger in the future, and to support the prosecution's argument that he had to be sentenced to death rather than life, because he already had three fifty-year sentences and a life sentence would be meaningless.

Based on the information Bratton had at the time of Morrow's guilty pleas, it cannot be said that any advice to accept the state's offer was deficient. The most damaging aspect of the convictions was their tendency to belie Morrow's assertion that he had not intended to kill Frazier or the police officers.[4] The state could use the convictions to undermine his

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[4] The impeachment value of the convictions was minimal given Morrow's extensive criminal history and, again, would have been meaningless unless Morrow testified. Whether he had

testimony only if he testified, however, and Bratton had no reason to expect that Morrow would change his story so that it made sense to have him testify. As Bratton expressed it at the state evidentiary hearing, "I never in my wildest imagination would think any competent counsel would put Ricky Morrow on to testify." I *Ex parte Morrow* 288. Judged from counsel's perspective at the time the events transpired, his conclusion that the plea bargain would not harm Morrow was not unreasonable.

B. Morrow can show no prejudice from the decision to plead guilty to the other charges pending against him.

Assuming, *arguendo,* that Bratton was deficient with regard to Morrow's guilty pleas, Morrow has not, and cannot, show that he was prejudiced. As noted previously, *see* note 4, *supra,* one of the reasons Morrow did not testify at his first trial was that he could have been impeached by his extensive criminal record. Providing more impeachment material for the state was of little consequence. Similarly, his background amply supported the state's claim that only a death sentence would protect society adequately from his continued violence. Finally, evidence of the attempted capital murders, including the testimony of the officers that Morrow fired shots at them, would have been introduced as it was at the first trial, whether he had

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pleaded guilty or not, the facts of the extraneous offenses could have been introduced at the punishment phase of the trial to support the state's argument that he would be a future danger. And in light of Morrow's proven propensity for violent behavior, the state had little need for the fact that he already was serving a fifty year sentence to successfully argue that the only meaningful sentence would be one of death.

pleaded guilty to the crimes or not. And at the first trial, even without the evidence that Morrow had pleaded guilty to the other crimes, the jury had returned a sentence of death. It is a reasonable conclusion that a later jury, hearing the same evidence, would have done the same.

On the other hand, the state had solid evidence of Morrow's guilt of the attempted capital murders and the aggravated robbery. I *Ex parte Morrow* 478-80. Although Bratton first recommended that Morrow plead not guilty to the charges, he considered the state's offer of fifty-year sentences in each case, running concurrently, to be reasonable. *Id.* What is not reasonable is to accept Morrow's assertion that he would not have pleaded guilty had he known that the convictions could be used against him at his capital murder retrial. Their use at the retrial was insignificant and unnecessary, and the results would have been the same even without them. Thus, Morrow can show no prejudice from counsel's actions.[5] Certiorari review is not warranted.

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[5] This disposes of Morrow's contention that the consequences of his guilty pleas of which he complains are direct, not collateral. The effect here of the guilty pleas was not on the sentence that Morrow received for the crimes to which he pleaded guilty. Rather, the pleas at most had a potential effect on the capital murder case, but only if the first conviction was reversed and the case was retried. The effects were therefore similar to using a conviction to enhance a later sentence, something that Morrow admits is a collateral consequence. *See* Petition at 8, *citing Unites States v. Lambros,* 544 F.2d 962 (8th Cir. 1976), *cert. denied,* 430 U.S. 930 (1977).

CONCLUSION

For the foregoing reasons, Respondent respectfully requests that the petition for writ of certiorari be denied.

Respectfully submitted,

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